

## RESULTS OF THE PILOT PROGRAM EVALUATION

### A. The Evaluation Process

The State Bar Court conducted its formal evaluation of the Pilot Program between January and April 2004. The goal of the evaluation was to determine (a) whether the Pilot Program should continue; and (b) if so, what changes if any, should be made in the Program to improve its operation and efficiency.

The evaluation process had three separate components: (1) a written survey sent to Deputy Trial Counsel, Respondents' Bar members and attorneys involved in one of the stages of participation in the Pilot Program; (2) public forums conducted in Los Angeles and San Francisco; and (3) interviews with LAP staff and the State Bar Court's own staff.

It is also our intent, with the authorization of the Board Committee on Regulation, Admissions and Discipline Oversight, to publish this Evaluation Report and the Report's recommendations for a 90-day public comment period.

#### 1. Written Survey

The written survey was developed by the State Bar Court with the assistance of a consultant familiar with court operations. The survey included statements about the Pilot Program and asked the individual responding to the survey to indicate the degree to which he or she agreed or disagreed with the statement.<sup>1</sup> The statements covered four general areas of interest relating to the Pilot Program, i.e., (a) communication about the Program; (b) interaction between the Pilot Program and the Lawyer Assistance Program; (c) Program participation; and (d) overall assessment of the Program.

A total of 174 written survey questionnaires were mailed. Recipients were given a period of approximately four weeks within which to respond to the survey. A total of 25 responses were received (a 14.37% response rate). Surveys were sent to and received from the following categories of individuals:

<u>Group to Whom Survey Sent</u>	<u># Mailed</u>	<u># Received</u>
Pilot Program participants (at any stage)	92	11
Respondents' counsel	25	6
Office of Chief Trial Counsel attorneys	57	8

To increase accessibility and the potential volume of responses, the survey was also posted on the State Bar Court's section of the State Bar website. However, no additional survey responses were received as a result of posting the survey on the website.

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<sup>1</sup> There were 7 potential responses to each survey question: (1) "strongly agree"; (2) "agree"; (3) "agree somewhat"; (4) "disagree somewhat"; (5) "disagree"; (6) "strongly disagree"; and (7) "I don't know."

## **2. Public Forums**

The State Bar Court held two public forums to solicit input on the Pilot Program. The first public forum was held in Los Angeles on February 19, 2004, and the second was held in San Francisco on February 20, 2004. Notice of the public forums was sent to all participants in the Pilot Program, their counsel and to all Deputy Trial Counsel in the Office of the Chief Trial Counsel. Additionally, notification of the public forums was also mailed to all local, speciality and minority bar associations and was placed on the State Bar's website. Finally, a press release was issued and placed in the State Bar's "e-brief" document that is sent to interested parties.

Regrettably, each of the public forums was lightly attended. Only two individuals spoke at the public forum in Los Angeles, while three individuals spoke in San Francisco.

## **3. Interviews**


Doug Hull, the State Bar Court's Administrative Specialist, interviewed the staff of the LAP and members of the State Bar Court's own staff. In particular, Mr. Hull interviewed Janis Thibault, Director of LAP, three LAP Case Managers and six State Bar Court Case Administrators. Attorneys participating in the Pilot Program are assigned a Case Manager, who may also interact with the Pilot Program Judge in particular cases. State Bar Court Case Administrators act as court clerks for the State Bar Court judges. The six Case Administrators selected for interviews are directly involved in supporting the Pilot Program Judges. The questions posed in the interviews were modeled after the information contained in the written surveys.

## **B. Evaluation Results**

### **1. Survey Results**

Attached as Appendix A are tables setting forth the questions posed in the survey and the responses received from each of the three groups to whom the survey was sent (i.e., participants in the Pilot Program; respondents' counsel and Deputy Trial Counsel).

#### **(A) Summary of Positive Survey Responses**

 **The Court Should Continue the Pilot Program:** 19 of the 22 individuals who provided a substantive response to this survey question<sup>2</sup> agreed that the Court should continue the Pilot Program [15 "strongly agreed"; 3 "agreed" and 1 "somewhat agreed"]. Three Deputy Trial Counsel strongly disagreed that the Pilot Program should be continued.

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<sup>2</sup> One of the possible responses to each survey question is "I don't know." Additionally, of the 25 survey respondents, a number of individuals either failed or declined to answer one or more of the questions. Therefore, in summarizing the responses to each question, we have omitted reference to those individuals who either did not answer the question or answered "I don't know."

- ☞ **The Court Is Sensitive to Personal Nature of Issues:** All 20 of the individuals who responded to this question agreed that the Court is sensitive to the personal nature of the issues raised and discussed in the Pilot Program.
- ☞ **The Court Does a Good Job Maintaining Confidentiality:** 16 of the 17 individuals who answered this survey question agreed with the statement that the Court does a good job maintaining the confidentiality of the participants' substance abuse or mental health issues. Only one person (a Pilot Program participant) disagreed with that statement.
- ☞ **The Court Treated the Parties Fairly:** 17 of the 22 individuals responding to this survey question agreed that the Court was fair in its treatment of the parties, with 12 of those 17 respondents "strongly agreeing" with the statement. Of the 5 individuals who disagreed with the statement, 2 were Pilot Program participants and 3 were Deputy Trial Counsel.
- ☞ **Parties Were Made Aware of Pilot Program in Timely Manner:** 17 of the 21 individuals who answered this question agreed with the statement. Of the 4 individuals who disagreed, 3 were Pilot Program participants and 1 was a Deputy Trial Counsel.
- ☞ **Parties Had Adequate Chance to State Discipline Positions:** 18 of the 21 individuals who answered this survey question agreed that the Court gave the parties an adequate opportunity to state their respective positions on the degree of discipline that should be imposed. Of the 3 individuals who "disagreed somewhat" with this statement, 1 was a Pilot Program participant and 2 were Deputy Trial Counsel.
- ☞ **Court Provided Adequate Assistance to Parties in Reaching Stipulation:** 17 of the 20 survey respondents who answered this question agreed that the Court had provided adequate assistance to the parties in helping them reach a stipulation as to facts and conclusions of law. Two of the three individuals who "disagreed somewhat" with this statement were Pilot Program participants, while the third person was a Deputy Trial Counsel.
- ☞ **It Was Easy to Understand the Pilot Program:** 16 of the 21 individuals who provided a substantive response to this question agreed that the Pilot Program was easy to understand when it was explained by the Pilot Program Judge. Two Pilot Program participants, two Respondents' counsel and two Deputy Trial Counsel disagreed with the statement.
- ☞ **The Written Information About the Pilot Program Provided by the Court Helped in Better Understanding the Program:** 16 of 21 individuals providing a substantive response to this question agreed that the written information provided to the parties by the Court helped them to

better understand the Pilot Program. Of the five persons who disagreed that the written material was helpful to their understanding of the Program, two were Deputy Trial Counsel and three were Pilot Program participants or Respondents' counsel.

- ☞ **Evaluation Process Was Consistent With Expectations:** 14 of the 18 individuals who answered this question agreed that the evaluation process conducted by the Lawyer Assistance Program was consistent with their understanding and expectations. Three of the 4 individuals who disagreed with the statement were Pilot Program participants.

## **(B) Summary of “Mixed” or “Divided” Survey Responses**

- ☞ **The Evaluation Process By LAP Did Not Delay the Resolution of the Disciplinary Proceeding:** 14 of the 22 individuals who responded to this question agreed with the statement that LAP's evaluation process did not delay the resolution of the disciplinary proceeding against the Pilot Program participant. However, 5 of the 8 individuals who disagreed with this statement were Deputy Trial Counsel, with their responses being either “strongly disagree” or “disagree.”
- ☞ **Terms of the Pilot Program Are Fair:** 13 of the 19 individuals who responded to this question agreed that the terms of the Pilot Program are fair. Four of the six individuals who disagreed with the statement were either Pilot Program participants or Respondent's counsel.
- ☞ **Minimum Term for Pilot Program Participation is Appropriate:** There was significant disagreement in the responses to this question. Of the 9 individuals who agreed with this statement, 8 were either Pilot Program participants or Respondent's counsel. Of the 10 individuals who disagreed with the statement, 3 were Deputy Trial Counsel, 4 were Pilot Program participants and 3 were Respondent's counsel.
- ☞ **Sufficiency of Degree of Discipline:** There were three separate survey questions addressing the issue of discipline: (i) is the discipline too severe; (ii) is the discipline not severe enough; and (iii) is the discipline appropriate. Not surprisingly, there was a marked distinction between the views of Deputy Trial Counsel on the one hand and the Pilot Program participants and Respondent's counsel on the other hand.
  - ✓ *Recommended Discipline Too Severe:* 16 individuals (7 Pilot Program participants, 5 Respondent's counsel and 4 Deputy Trial Counsel) disagreed with the statement that the levels of discipline recommended by the Court are too severe. The remaining 6 individuals who responded to this question (3 Pilot Program participants, 2 Respondent's counsel and 1 Deputy Trial Counsel) believe that the recommended discipline was too severe.

- ✓ *Recommended Discipline Not Severe Enough:* 16 individuals (9 Pilot Program participants, 5 Respondent's counsel and 2 Deputy Trial Counsel) disagreed with the statement that the discipline levels recommended by the Court are not severe enough. The remaining 4 individuals who responded to the question (1 Pilot Program participant and 3 Deputy Trial Counsel) agreed with the statement that the recommended discipline is insufficient.
- ✓ *Recommended Discipline is Appropriate:* 13 individuals (7 Pilot Program participants, 4 Respondent's counsel and 2 Deputy Trial Counsel) agreed with the statement that the levels of discipline recommended by the Court are appropriate. Of the 6 individuals who disagreed with the statement, 2 were Pilot Program participants, 1 was a Respondent's counsel and 3 were Deputy Trial Counsel.

## **2. Interview Results**

### **(A) Interviews with LAP Staff**

As previously indicated, the Director of the Lawyer Assistance Program and three LAP Case Managers were interviewed regarding their views about the Pilot Program. The questions asked in the interview were similar to those contained in the survey questionnaire.

All LAP interviewees strongly recommended the continued operation of the Pilot Program, although one of the Case Managers expressed the belief that the Program should be more of a true diversion program.

All LAP interviewees also agreed that the Court does a good job of cooperating with the LAP and supporting the LAP's treatment program. Several of the interviewees identified the Court's support and reinforcement of LAP treatment programs as one of the greatest strengths of the Pilot Program.

The LAP interviewees unanimously agreed that the Court is sensitive to the confidential nature of the LAP treatment information and does a good job of maintaining the confidentiality of the participants' substance abuse or mental health issues. There was also unanimous agreement that the Court is fair in its treatment of the parties and that the minimum term for Pilot Program involvement is appropriate, although one Case Manager indicated that some participants are confused by the fact that they are required to participate in the LAP for five years but are only required to participate in the Pilot Program for 18 to 36 months.

The only significant difference of opinion among the LAP interviewees related to communication issues. Three of the interviewees agreed that the Court communicates necessary information to the LAP, that it clearly

communicates the type of information it is seeking from the LAP and that the LAP understands the needs of the Court with regard to LAP participation reports. One interviewee, however, noted that there is more communication between LAP and the Office of the Chief Trial Counsel than there is between LAP and the Court. Another interviewee commented that it isn't always clear whether the Court has communicated necessary information to LAP/Pilot Program participants, although the interviewee acknowledged that it may be attributable to the participant not hearing what the Court is telling them.

The LAP interviewees identified the following as the strengths of the Pilot Program:

- ⇒ Provides external pressure on attorneys to participate in LAP
- ⇒ Demonstrates sensitivity to substance abuse/mental health problems
- ⇒ Provides opportunity to break disciplinary recidivism
- ⇒ Matches recovery with personal accountability
- ⇒ Provides a forum allowing attorneys to admit their problems instead of hiding or covering up those problems

When asked about the weaknesses of the Pilot Program, the LAP interviewees had the following responses:

- No great weaknesses
- Better communication about the Court's needs
- Better education of Court on what LAP does
- Length of time between application and acceptance into Pilot Program
- Not a complete diversion program

#### **(B) Interviews with State Bar Court Staff**

Interviews were conducted with the six State Bar Court Case Administrators who have worked with the Pilot Program Judges. Case Administrators act as court clerks, supporting their assigned judge in court, maintaining the official court file, processing pleadings and filing and serving orders issued by the State Bar Court. The Case Administrators assigned to Pilot Program Judges were interviewed in particular for their insight in how Pilot Program cases could be processed more efficiently and for their assessment regarding the interactions between the Court and the parties in Pilot Program proceedings.

The Case Administrators were unanimous in their view that the Court has been sensitive to the confidential nature of the treatment and medical information relating to Pilot Program participants and that the Court has done a good job in maintaining that confidentiality. The Case

Administrators also unanimously feel that the Court has been fair in its treatment of the parties in Pilot Program cases.

The Case Administrators were divided in their opinions regarding the adequacy of the resources available for Pilot Program matters. At least one Case Administrator stated that the State Bar Court resources were adequate but that additional Deputy Trial Counsel should be assigned to Pilot Program matters. Two Case Administrators stated that additional judicial resources were needed, perhaps by assigning Pilot Program matters to all hearing judges. Another Case Administrator opined that there were sufficient judicial resources but that additional State Bar Court staff resources were needed. Several Case Administrators noted that Pilot Program cases involve a considerable amount of paperwork but at least one Case Administrator contended that the amount of paperwork isn't much different from the paperwork involved in other cases.

All Case Administrators agreed that the Office of the Chief Trial Counsel and Respondent's counsel have been cooperative with the Court in Pilot Program matters and, for the most part, with one another. Several Case Administrators commented that the parties could benefit from additional court assistance in settlement discussions.

The Case Administrators also unanimously agreed that the reports received by the Court from the LAP are valuable, received on a timely basis and easy to understand.

Asked for suggestions for streamlining the Pilot Program process, most Case Administrators responded that the process was already fairly streamlined. The only substantive suggestions offered included additional assistance with settlement and the attorney's development of information relating to the nexus between his or her substance abuse or mental health problem and the misconduct in the proceeding.

### **3. Public Forums**

There were a total of five speakers at the public forums conducted in Los Angeles and San Francisco on February 19 and 20, respectively. Speaking in Los Angeles were Board of Governors member James Heiting and Respondent's counsel, JoAnne Earls Robbins. In San Francisco, Deputy Trial Counsel Cydney Batchelor, LAP Oversight Committee member Richard Ewaniszyk and LAP Director Janis Thibault spoke.

Mr. Heiting spoke about the Pilot Program Interaction Advisory Committee, an ad hoc committee created in January 2003 to provide input and assistance in the coordination and implementation of both the Lawyer Assistance Program and the Pilot Program. Mr. Heiting is the chairperson of that committee. Mr. Heiting stated that, in his view, the LAP and Pilot Program are the best things that the State Bar has done for its members. In terms of areas where further improvement

or development may be appropriate for both LAP and the Pilot Program, Mr. Heiting noted that (a) the LAP's requirement of a 5-year commitment for successful completion of the LAP is a disincentive for some attorneys participation, thereby precluding them from participating in the Pilot Program as well; (b) there are still some delays in the evaluation process; and (c) there needs to be more treatment alternatives available for LAP participants with mental health issues.

In her comments at the public forum in Los Angeles, Ms. Robbins, a former State Bar Court hearing judge and former Deputy Trial Counsel, stated that she felt the Pilot Program was a "wonderful program" that should have been started ten or fifteen years earlier. Ms. Robbins believes that there should be more emphasis on treatment of mental health issues in both the LAP and the Pilot Program. While there are other alternatives for individuals with substance abuse problems (e.g., The Other Bar, AA, etc.), people with emotional and mental challenges have fewer alternatives and often have neither insurance coverage or available community services for which they qualify. Ms. Robbins urged the Court and the Office of the Chief Trial Counsel to make information about the Pilot Program available to respondents at the earliest possible stage. Finally, Ms. Robbins stated that the 5-year LAP commitment was too long in some cases.

Deputy Trial Counsel Cydney Batchelor was one of the speakers at the public forum in San Francisco. Ms. Batchelor is the sole DTC assigned to handle Pilot Program cases in San Francisco. Charles Murray and Brooke Schaefer are the DTC assigned to Pilot Program matters in Los Angeles. Ms. Batchelor emphasized that the Pilot Program has made a substantial difference in the lives of many of the participants in the Program. However, Ms. Batchelor expressed her concern that the Pilot Program is only being used by the most serious disciplinary offenders and that attorneys who have committed less serious misconduct are unwilling to enter into the Pilot Program because of the period of time they must participate in the LAP. Ms. Batchelor stated that there should also be more opportunities for diversion for minor offenses. Finally, Ms. Batchelor expressed her desire for allowing Pilot Program participants to serve their disciplinary suspensions at the commencement of their participation in the Pilot Program rather than after they have completed the Program. Ms. Batchelor stated that, overall, the both the Pilot Program and LAP have been wonderful and that they have made an astonishing change in the lives of their participants.

In addition to being a member of the LAP Oversight Committee, Richard Ewaniszyk is a past president of The Other Bar and served on its Executive Committee for 14 years. Mr. Ewaniszyk was highly complimentary of the Pilot Program but agreed with Ms. Batchelor's statement that the Pilot Program is used primarily by the more serious offenders. Because participation in the LAP costs \$15,000 to \$20,000 and involves a 5-year commitment, attorneys who have committed minor offenses are unwilling to expend that amount of time and money to take advantage of the Pilot Program. Mr. Ewaniszyk urged the State Bar Court and the Office of the Chief Trial Counsel to explore categories of offenses that would be eligible for diversion or an LAP commitment of only six months or one



year. Mr. Ewaniszyk stressed the importance of the LAP and Pilot Program becoming involved with the attorney at a very early stage to “plant the seeds of what it takes to stay sober.” Finally, Mr. Ewaniszyk urged group therapy or discussion alternatives for individuals with mental health issues that are different from the group meetings attended by individuals with substance abuse problems.

The final speaker at the public forum in San Francisco was Janis Thibault, Director of the State Bar’s Lawyer Assistance Program. Ms. Thibault commented that she never imagined that there would be more than 70 attorneys involved in the Pilot Program at this early stage of the Program’s existence. She believes that this large number of participants is reflective of the cooperative effects of the State Bar Court, the Office of the Chief Trial Counsel and LAP. Ms. Thibault stated that one of the comments that she frequently receives from attorneys who are participants in the LAP and the Pilot Program relates to their positive interactions with the State Bar Court judges. Ms. Thibault stated that, while holding the attorneys accountable for their conduct, the Pilot Program Judges successfully communicate to these attorneys that they are interested in their success and are supportive of their rehabilitative efforts.

#### **4. Written Comment From Chief Trial Counsel**

On March 2, 2004, State Bar Court Presiding Judge Ronald W. Stovitz received a memorandum from Chief Trial Counsel Mike A. Nisperos regarding his comments about the Pilot Program. (A copy of Mr. Nisperos’ written comment is attached as Appendix B.)

In his memorandum, Mr. Nisperos stated that the Pilot Program has provided greater public protection by closely monitoring the treatment and law practices of attorneys in the Pilot Program and by immediately taking corrective action against those attorneys who are not in compliance with LAP or Pilot Program requirements. Additionally, Mr. Nisperos stated that the State Bar Court judges have demonstrated their personal commitment to the success of the Pilot Program and that State Bar Court resources have been assigned to facilitate its success.

However, Mr. Nisperos had a number of suggestions for changes to the Pilot Program, which are summarized below:

- While LAP may require its participants to remain in treatment for five years, the Pilot Program should be flexible in adjusting the Program’s disciplinary monitoring period in proportion to the severity of the misconduct;
- The State Bar Court should consider a greater diversity of treatment options for referral of Pilot Program participants;
- Diversion should be offered for low level misdemeanor convictions that involve drugs or mental health problems;

- Pilot Program participants should be allowed to serve any period of actual suspension at the beginning of their Pilot Program participation, rather than at the end of the Program;
- Some of the information contained in the State Bar Court's Program Outline for the Pilot Program should be incorporated into the Rules of Procedure, including (a) program eligibility; (b) scope of participation; and (c) disciplinary offenses excluded from the program;
- The Court should broaden the categories of individuals who are excluded from participation in the Pilot Program to include other misconduct, such as conduct that would have qualified for summary disbarment if the attorney had been criminally prosecuted and convicted of the alleged offense;
- The Court should amend the confidentiality rule to clarify the extent to which the Office of the Chief Trial Counsel may share information about the attorney with the complainant.

The State Bar Court has considered the suggestions that were included in Mr. Nisperos' March 2, 2004, memorandum and has included several of them in its recommendations set forth below. As to those suggestions which the State Bar Court has not recommended at this time, the Court provides the following brief responses to those suggestions:

1. Adjustment of Discipline Monitoring Term: The Court is adamant in its position that individuals should participate in the Pilot Program for a minimum of 18 months (which includes earned reductions in the period of participation) and that the attorney must be substance free for a minimum period of one year or, in cases of mental health issues, until the Court receives a report from an appropriate mental health professional indicating that Pilot Program monitoring is no longer necessary. However, the Court currently does consider shorter periods of subsequent disciplinary probation. As in other disciplinary matters, the Court seriously considers the recommendations of the parties as to the appropriate period of probation, especially where it is a joint recommendation of the Office of the Chief Trial Counsel and the respondent attorney.
2. Diversity of Treatment: In order to participate in the Pilot Program, the Court requires the attorney to be accepted for participation in the Lawyer Assistance Program. The reasoning behind this requirement is two-fold. First, the statutory right to diversion or a reduction in discipline is *only* available to those attorneys who successfully complete LAP. (Bus. & Prof. Code, § 6233.) Secondly, the Court is willing to offer significant reductions in the discipline to be imposed or recommended in Pilot Program cases because it has confidence in the treatment oversight provided by LAP and in the cooperative and ongoing relationship between LAP and the Court.

No attorney is required to participate in either LAP or the Pilot Program. Likewise, the fact that an attorney does not participate in the Pilot Program does not preclude him or her from receiving mitigating credit for rehabilitation from a substance abuse or mental health problem. However, by declining to participate in LAP and the Pilot Program, the attorney must present clear and convincing evidence demonstrating his or her entitlement to that credit. (See *Harford v. State Bar*, *supra*, 52 Cal.3d at p. 101; *Porter v. State Bar*, *supra*, 52 Cal.3d at p. 527.)

3. Diversion for Minor Criminal Convictions: The Court does not have any conceptual problems with offering diversion to attorneys who suffer low level misdemeanor convictions for alcohol and personal drug use offenses. Dismissal of the disciplinary proceeding following successful completion of the Pilot Program is already available for such offenses. Furthermore, the Office of the Chief Trial Counsel can move for a dismissal of a proceeding if they have entered into an agreement in lieu of discipline on any of these low level cases. However, to the extent that the Office of the Chief Trial Counsel proposes that no disciplinary proceeding should be initiated as a result of these convictions, the proposal would require a statutory change. Business and Professions Code section 6101, subdivisions (c) and (d) require that the certified record of all convictions be filed with the Supreme Court and that disciplinary proceedings shall be undertaken. (See rule 951(a), Calif. Rules of Ct. [delegating statutory duties under sections 6101 and 6102 to State Bar Court]; see also, rule 320(a), Rules Proc. of State Bar.) The only exception to this statutory requirement that has been made in the past is the transmittal of first-time convictions for driving under the influence. Because of the volume of these convictions, the Supreme Court previously directed the State Bar transmit only the second or subsequent DUI convictions.
4. Exclusion of Non-Summary Disbarment Conduct From Pilot Program: As previously indicated, the only type of disciplinary matter that is automatically excluded from the Pilot Program is a criminal conviction that meets the criteria for summary disbarment under Business and Professions Code section 6102, subdivision (c). In his memorandum, Mr. Nisperos suggests also excluding from the Pilot Program conduct which would have qualified for summary disbarment if the attorney had been criminally prosecuted for the conduct and had been convicted of that conduct.

The State Bar Court does not believe that such an exclusion is appropriate. Any misappropriation of client funds in an amount in excess of \$400 constitutes “grand theft” within the meaning of Penal Code section 487, subdivision (a) and, if prosecuted and convicted, would qualify for summary disbarment. Therefore, all misappropriations in excess of \$400 would be excluded from the Pilot Program. Similarly, any false statement in a declaration prepared by an attorney constitutes “perjury” within the

meaning of Penal Code section 118, subdivision (a) and, if prosecuted and convicted, would qualify for summary disbarment.

In the Court's view, participation in the Pilot Program should be as broadly available as possible. If the attorney's misconduct is causally connected to his or her substance abuse or mental health issue, it appears to the Court that treating the underlying problem (i.e., the substance abuse or mental health issue) will significantly reduce, if not eliminate, the likelihood that the misconduct will be repeated. However, by excluding the attorney from participation in the Pilot Program, it may preclude the attorney from receiving needed treatment for his or her problem.